HAY ME KIAN & ANOR A

v.

DEWAN BANDARAYA KUCHING UTARA

HIGH COURT SABAH & SARAWAK, KUCHING B
ABDUL AZIZ RAHIM J
[CIVIL APPEAL NO: 12-11-2007-II]
18 JANUARY 2008

LOCAL AUTHORITY: *Maintenance and repair - Negligence - Road accident - Tree falling on vehicle travelling along road - Statutory obligation - Whether duty of care owed - Local Authorities Ordinance 1996, ss. 119, 120(3) - City of Kuching North Ordinance 1988, s. 3(1)* C

TORT: *Negligence - Breach of statutory duty - Road accident - Tree falling on vehicle travelling along road - Local authority - Statutory obligation - Whether duty of care owed - Local Authorities Ordinance 1996, ss. 119, 120(3) - City of Kuching North Ordinance 1988, s. 3(1)* D

TORT: *Negligence - Duty of care - Road accident - Tree falling on vehicle travelling along road - Local authority - Statutory obligation - Whether duty of care owed - Local Authorities Ordinance 1996, ss. 119, 120(3) - City of Kuching North Ordinance 1988, s. 3(1)* E

ROAD TRAFFIC: *Negligence - Breach of statutory duty - Road accident - Tree falling on vehicle travelling along road - Local authority - Statutory obligation - Whether duty of care owed - Local Authorities Ordinance 1996, ss. 119, 120(3) - City of Kuching North Ordinance 1988, s. 3(1)* F

TORT: *Damages - Assessment - Negligence - Breach of statutory duty - Special damages - Evidence of claims - Whether substantiated* G

DAMAGES: *Action for - Injury sustained by reason of breach of statutory duty - Assessment - Special damages - Evidence of claims - Whether substantiated*

H

DAMAGES: *Head injury - Fracture of left parietal region with extradural haematoma - General damages - Assessment of sum to be awarded - Principles applicable*

The 1st appellant was driving his taxi ('vehicle') along a road named Jalan Crookshank ('said road') when a tree fell on his vehicle, resulting in him sustaining injuries and the vehicle, which belonged to the 2nd appellant, being badly damaged. The 1st I

A appellant brought a claim against the respondent for general and special damages due to injuries suffered, while the 2nd appellant's claimed special damages for the damaged vehicle. The appellants' action was premised on negligence and breach of statutory duty on the respondent's part. Their case was that the place of the B accident was within the jurisdiction of the respondent pursuant to s. 3 of the City of Kuching North Ordinance 1988 ('1988 Ordinance'). The respondent was thus under a duty to maintain the trees in a healthy state to ensure that they did not pose a risk and danger to the public when driving along the said road. C The respondent, however, submitted that it had no statutory obligation under the Local Authorities Ordinance 1996 ('1996 Ordinance') to attend to the maintenance and preservation of the trees. The respondent also averred that the alleged place of the accident – lot 51, which was state land – was not at any time a D public place within the meaning of the Public Parks and Greens Ordinance 1993 ('1993 Ordinance'). It was further contended that the place was never vested in the respondent under the 1993 Ordinance and that, therefore, it had no general control or care for the protection and preservation of the trees. The sessions E court dismissed the appellants' claim against the respondent. Hence, the present appeal, in which two main issues were raised: (i) whether the respondent had a statutory obligation under the relevant laws to maintain, manage and exercise control over the trees on lot 51, which had not been gazetted and declared as a F special area under s. 3(1) of the 1993 Ordinance and, if so, whether the respondent had been negligent in its duty to maintain the trees on lot 51; and (ii) whether the respondent owed the appellants a duty of care under s. 119 of the 1996 Ordinance to maintain the area, notwithstanding that lot 51 had not been G gazetted and declared as a special area under s. 3(1) of the 1993 Ordinance.

Held:

H **(1)** The 1993 Ordinance had no application in this case and was irrelevant. The 1993 Ordinance is a special Ordinance for the creation and preservation of greens and public parks. It is not a general legislation that confers powers of a public or local authority on the respondent. The respondent's powers are I found in the 1996 Ordinance and the 1988 Ordinance. Upon a liberal reading of these two Ordinances, it is obvious that the authority and powers of the respondent extend to every inch of the area within its jurisdiction regardless of whether it

is state land or privately owned land. The only difference is that for privately owned land or property, the respondent is under no statutory obligation to maintain and make it safe for the public. However, under s. 120(3) of the 1996 Ordinance, the respondent has a responsibility to ensure that the private owners keep their property safe for the public. The respondent enforces this responsibility by issuing notices to the private property owners to take appropriate action to remove any source of danger emanating from the property that is dangerous to the public, particularly users of public roads. On the same basis the respondent is entrusted with a duty to maintain or cut down impugned diseased trees that grow on state land where the owner is the state government, if the land is within the jurisdiction of its declared local limit. The respondent is the agency entrusted to look after the local authority area where the said road was situated and where the impugned diseased tree fell on the 1st appellant's taxi. As to whether the respondent is a crown agent, it is not in dispute that the respondent, although established under its own Ordinance, is machinery of the government entrusted to provide local authority services to the public within its jurisdiction. (paras 19 & 20)

(2) On the second issue, the law as found in s. 3(1) of the 1988 Ordinance delineates the area of City of Kuching North, as described in the Schedule to the Ordinance. This area includes lots 43 and 51, and it is not disputed that the respondent is the designated local authority for the area. Under s. 119 of the 1996 Ordinance, a local authority has powers and shall exercise functions in respect of public roads, other than a federal road, within its local authority area. Pursuant to paras. (f), (g) and (m) of that section, these powers and functions include maintaining road shoulders or verges, pavements and public drains; providing landscaping for beautification of public roads and to do such act or take such action as may be necessary to ensure the safety and convenience of the public on any road in a local authority area. These provisions, especially para. (m) of the section which stresses on the safety of the public using public roads, must be interpreted liberally in order to give effect to the provisions. This interpretation is to be preferred if the section is read together with s. 120(3) of the 1996 Ordinance. From the reading of these two provisions it is obvious that a local authority has a duty to

maintain all public roads, and also the power to direct private road owners to maintain their private roads for the safety of the public who uses the roads. (paras 21 & 22)

(3) In the circumstances therefore, the answer to the two issues raised in this appeal was in the positive. Accordingly, the respondent was liable for negligence in that it had breached its statutory duty to maintain the said road to ensure that it was safe for public use. (para 23)

(4) In respect of the 1st appellant's claim for special damages, his claims for loss of income and nursing care must be strictly proved. Since there was a lack of evidence to prove the claims, they were both disallowed. His claims for medical bills from the hospital, cost of transportation for relatives to and from the hospital and other minor miscellaneous costs were allowed as they were well supported by documentary evidence. (paras 28, 29, 30, 31, 32 & 33)

(5) Regarding the 1st appellant's claim for general damages, he had suffered a fracture of the left parietal region with extradural haematoma for which he had to be operated upon. Having regard to the injuries sustained by the 1st appellant and the awards given for similar injuries in the relevant authorities, the figure suggested by the 1st appellant was on the high side. There was no medical evidence or report suggesting that he suffered any disability, temporary or permanent, after the discharge from the hospital. There was also no evidence to show that he was unable to return to work as a taxi driver. It was also pertinent to consider that in cases where the court had found neurological disabilities or otherwise, the award was very much less than the RM100,000 suggested by the 1st appellant. In this instance, there were no neurological disabilities and no permanent injury that could reduce the 1st appellant's capacity to function as normal as before the accident. A sum of RM30,000 – taking into account the inflationary factor – would be fair and reasonable. (paras 34, 35, 36 & 37)

(6) As to the 2nd appellant's claim for special damages amounting to RM25,000 for the vehicle, in the absence of any substantive evidence as to the value of the vehicle at the time of the accident, the court was unable to make a judicial assessment of the value of the vehicle that was damaged for

the purpose of the claim under this head. Nevertheless, there was a value to be attached to the vehicle at the time of the accident and, in the circumstances, a nominal sum of RM100 would be awarded for the loss of the vehicle. (para 38, 39 & 40)

[Order accordingly.]

Case(s) referred to:
Goh Chin Tee (infant) v. Lau Chun Leung [1985] MLJ 2 cxii ***(refd)***
Thangavelu v. Chia Kok Bin [1981] 2 MLJ 277 ***(refd)***

Legislation referred to:
City of Kuching North Ordinance 1988, ss. 3(1), 6A(1)
Local Authorities Ordinance 1996, ss. 5, 119, 120(1), (3)
Public Parks and Greens Ordinance 1993, s. 3(1), 5, 6, 7
Road Transport Act 1987, s. 67

For the 1st & 2nd appellants - Lim Heng Choo; M/s Lim & Lim
For the respondent - Stanley Eddy; M/s Battenberg & Talma

Reported by Suresh Nathan

JUDGMENT

Abdul Aziz Rahim J:

[1] On or about 19 October 2000 the appellant was driving his taxi bearing registration no. HQ207 ("the vehicle") along Jalan Crookshank near the entrance of Kuching Civic Centre and Sarawak Tennis Court. The appellant alleged that while he was driving, a tree fell on the vehicle. As a result of the accident the 1st appellant sustained injuries and the vehicle was badly damaged.

[2] The 1st appellant was the authorized driver of the vehicle. The vehicle belonged to the 2nd appellant. Thus both appellants claimed against the respondent damages and injuries. The 1st appellant's claim is for injuries suffered and the 2nd appellant's claim is for special damage for the damaged vehicle.

[3] The appellants' action is premised on negligence and breach of statutory duty purportedly on the part of the respondent for failure to ensure and maintain the trees. The particulars of negligence are set out in para. 6 of the appellants' amended statement of claim.

A **[4]** The appellants' case is that the place of accident ie along Jalan Crookshank near the entrance of the Kuching Civic Centre or thereabout is within the jurisdiction of the City of Kuching North pursuant to s. 3 (particulars of which are in the Schedule) of the Kuching North Ordinance 1988. Therefore the appellants B contend that the respondent is under a duty to maintain the trees in a healthy state to ensure it did not pose a risk and danger to the public, in particular to 1st appellant when driving along the said road.

C **[5]** The respondent's case is that it has no statutory obligation pursuant to the Local Authorities Ordinance 1996 or any other legislation to attend to the caring, maintenance, preservation or supervision of the trees. It was also the respondent's case that the alleged place of accident was not at any time a public place D within the meaning of the Public Parks and Green Ordinance 1993. Also, it was contended by the respondent that the place was never vested in them under the Ordinance and therefore it has no general control or care for the protection and preservation of the said tree. Alternatively, the respondent contends that the E accident was an inevitable one or it was attributed solely to an act of God, natural calamities or forces of nature or inclement weather at the material time which were entirely beyond the control or foreseeability of the respondent.

F **[6]** It is not in dispute that the trees in question were situated on lots 43 and 51, which are state land. It is also not in dispute that the two lots are within the territorial limits of City of Kuching North and therefore is within the jurisdiction of the respondent. The respondent contends that it is under no statutory duty to G maintain or care for any tree grown on state land within the jurisdiction of the city limit unless the area has been gazetted and vested with the respondent under the Public Parks and Green Ordinance 1993. In this regard it is not disputed that the area covering lot 51 was never gazetted and vested as such.

H **[7]** The learned Sessions Court dismissed the appellants' claim against the respondent on the ground that lot 51 on which the fallen tree was purportedly situated was not within the jurisdiction of the respondent and thereby the respondent did not have a duty to maintain the trees grown at the shoulder or verge of Jalan I Crookshank. The Court also held that the respondent had no duty to maintain the trees grown on the road shoulder or verge of Jalan Crookshank under s. 119 of the Local Authorities

Ordinance 1996. The Court found that lot 51 was never gazetted and vested with the respondent under the Public Parks and Green Ordinance 1993 and therefore the respondent is under no obligation to maintain the trees grown on that lot.

[8] The appellants adduced evidence through PW3, who is the Town and Country Planner with the respondent. PW3 testified that Jalan Crookshank is within the respondent's jurisdiction and it is the respondent's duty to maintain the road. However she also testified that lot 51, the land adjoining Jalan Crookshank after the drain where there are trees is a state land used by the Sarawak Tennis Association. That lot she said was not gazetted under the Public Parks and Greens Ordinance 1993. And therefore the respondent does not maintain the land after the drain (ie lot 51) simply because it was not given power to maintain the lot.

[9] At this juncture it is to be observed that the Sessions Court had found that the fallen tree was from lot 51. And this is supported by the evidence of DW2 who testified that he received a report of fallen trees at Jalan Crookshank. DW2 testified that he then mobilised his workers to cut down the fallen trees. He further said that the fallen trees were about 6 metres from the public drain and were on lot 51.

[10] Evidence of respondent's witness DW2 supports the testimony of PW3 that the respondent is not under any obligation to maintain the trees on lot 51. DW2 testified that the trees were not planted by the respondent.

[11] It is the respondent's submissions that Jalan Crookshank itself may be under the jurisdiction of the respondent as contended by the appellant pursuant to s. 3 of the Kuching North Ordinance 1988 but that is in so far as the road goes. The area beyond Jalan Crookshank has to be declared a special area under s. 3(1) of the Public Parks and Greens Ordinance 1993 if the respondent was to be charged with responsibility to maintain, manage and exercise control over the area in accordance with the provisions of ss. 5, 6 and 7 of the same Ordinance.

[12] This appeal therefore raises two main issues. The first issue is whether the respondent has a statutory obligation under the relevant laws, to maintain manage and exercise control over the trees on lot 51 being a state land and has not been gazetted and declared as special area under s. 3(1) of the Public Parks and Greens Ordinance 1993. If so, whether the respondent has been

negligent in its duty to maintain the trees on lot 51. The second issue is whether the respondent owes the appellants duty of care under s. 119 of the Local Authorities Ordinance 1996 to maintain the area, notwithstanding that lot 51 has not been gazetted and declared as a special area under s. 3(1) of the Public Parks and Greens Ordinance 1993.

[13] With regard to the first issue, counsel for the respondent submits that s. 3 of the City of Kuching North Ordinance 1988 merely talks of composition of the area of City of Kuching North described in the schedule thereto. In other words, that section delineates the boundaries of the City of Kuching North. And this, counsel submits, may relate to matters of assessment rates only. He also submits that a local authority can only exercise its powers within its area of jurisdiction if it is expressly conferred on the local authority. He cited s. 5 of the Local Authorities Ordinance 1996 which provides that a local authority shall have and shall exercise only such powers within its jurisdiction as may conferred by the Ordinance and any other written laws subject to such restrictions as contained in the Ordinance and the written laws. Thus he submits that power in respect of the area on the state land must not only be vested and gazetted, but must be provided for by written laws. As such he submits the Public Parks and Greens Ordinance 1993 is relevant. The obligation to maintain the area beyond Jalan Crookshank must be provided for by the Public Parks and Greens Ordinance 1993. In this respect counsel for respondent argues that the appellants have failed to show the statutory obligation to maintain the area.

[14] For the appellants it was submitted that the respondent has a duty to maintain the area. The area is within the jurisdiction of the City of Kuching North therefore comes under the purview of the respondent. He relies on s. 6A(1) of the City of Kuching North Ordinance 1988 which provides as follows:

> Powers and authority of Commission
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> 6A. – (1) The administration of the public affairs of the City of Kuching North, the provision of local authority services within the area described in the Schedule and the exercise of all those powers or functions conferred on a local authority under the Local Authorities Ordinance, 1966 [Cap. 20] or under this Ordinance or any other written law, shall be vested in and exercised by the Commission.

(2) Without prejudice to subsection (1) and notwithstanding the provisions of any other written law regulating the powers, duties and functions of a local authority or a local council, the powers, duties and functions of a local authority or a local council under any written law pertaining to -

(a) road traffic; and

(b) food and public health,

shall, within the City of Kuching North, be exercisable and discharged by the Commission, and accordingly, any reference in that written law to "local council" or "local authority", as the case may be, shall be construed to include the Commission.

(3) The Commission shall, in the discharge of its functions or the exercise of the powers conferred upon the Commission by this Ordinance, the Local Authorities Ordinance, 1996 [Cap. 20] and any other written law, comply with and give effect to any direction not inconsistent with this Ordinance, given by the Chief Minister to the Commission.

[15] Learned counsel also submits that the duty to maintain the area, which is a state land, is also on the respondent as crown agent of the Government or the State. He submits that the respondent is a local authority which has been declared as appropriate authority by the Federal Minister charged with the responsibility for local government under s. 67 of the Road Transport Act 1987. Therefore by virtue of s. 119 of the Local Authorities Ordinance 1996 the respondent is shouldered with that responsibility. Section 119 of the Local Authorities Ordinance 1996 provides:

119. A local authority which has been declared as an appropriate authority by the Federal Minister charged with the responsibility for local government under section 67 of the Road Transport Act 1987 shall have the following powers and exercise the following functions in respect of public roads, other than a Federal road, within its local authority area, -

(a) ...

(b) ...

(c) ...

(d) ...

(e) ...

A (f) maintain road shoulders or verges, pavements and public drains;

(g) provide landscaping for the beautification of public roads;

(h) …

B (i) …

(j) …

(k) …

C (l) …

(m) do any act or take any such action as may be necessary to ensure the safety and convenience of the public on any public road in a local authority area.

D **[16]** In addition, learned counsel for the appellants submits that the statutory duty of the respondent to keep the road safe and to maintain hedges and the trees bordering public roads is also evident in s. 120(1) and (3) of the Local Authorities Ordinance 1996. This section reads as follows:

E 120. – (1) All private roads shall be laid, maintained and repaired by the owners or occupiers of the premises abutting thereon, and all dust, dirt, rubbish and filth of every sort shall be collected and removed therefrom by such owners or occupiers.

F (2) …

(3) A local authority may, by notice in writing, order the owner or occupier of any premises, within a time to be stated in the notice and to such extent as may be prescribed in the notice, -

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(a) to trim or prune the hedges thereof bordering any public road;

(b) to cut and trim all trees which overhang any public road or which are likely to cause damage to telephone or electric wires;

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(c) to cut down any tree which stands so close to a public road or existing building that it constitutes, in the opinion of the local authority, a source of danger; and

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(d) to clear any portion of the premises which in the opinion of the local authority is dangerous to traffic on account of obstructing the view of drivers of motor vehicles.

[17] In my opinion the scope of authority and powers of the respondent to maintain the area in question must be seen within the context of the provision of the City of Kuching North Ordinance 1988 and the Local Authorities Ordinance 1996. These provisions must be interpreted liberally. The existence of a local authority like the respondent is to provide wide range of local authority services for the comfort, safety and well being of the community within its jurisdiction. It is beyond dispute that the respondent is entrusted to discharge its duties conferred or provided for it under two Ordinances and such other written laws to all the area within its territorial limits and that is within its jurisdiction. In this case its not disputed that lots 51 and 43 are state land. But they are also within the local limit of the respondent's area of jurisdiction.

[18] The respondent attempted to avoid responsibility in this case by arguing that it is not its responsibility to maintain the area of lot 51 and the trees grown on it because the lot was state land and it did not plant the trees there. Also, lot 51 was never declared and gazetted as a special area under s. 3(1) of the Public Parks and Greens Ordinance 1993 as in the case of lot 43.

[19] In my view, the Public Parks and Greens Ordinance 1993 has no application in this case and is irrelevant. That Ordinance is a special Ordinance for the creation and preservation of greens and public parks. It is not a general legislation that confers powers of a public authorities or local authority on the respondent. The latter's powers are found in the Local Authorities Ordinance 1996 and the City of Kuching North Ordinance 1988. Reading these two Ordinances liberally, I think it is obvious that the authority and powers of the respondent under them extend to every inch of the area within its jurisdiction regardless whether it is state land or privately owned land. The only difference is that for privately owned land or property the respondent is under no statutory obligation to maintain and make it safe for the public. However under s. 120(3) quoted above the respondent has a responsibility to ensure that the private owners keep their property safe for the public. The respondent enforces this responsibility by issuing notices to the private property owners to take appropriate action

to remove any source of danger emanating from the property that is dangerous to the public, particularly users of public roads. On the same basis therefore the respondent is entrusted with a duty to maintain or cut down the impugned diseased trees that grew on state land where the owner is the state government, if the land is within the jurisdiction of its declared local limit. The respondent is the agency entrusted to look after the local authority area where Jalan Crookshank was situated and where the impugned diseased tree fell on the 1st appellant's taxi.

[20] As to the issue whether the respondent is a crown agent it is never in dispute that the respondent, though established under its own Ordinance, is a machinery of the government entrusted to provide local authority services to the public within its jurisdiction. The respondent, as agency of the government, is under the control and supervision of the State Minister responsible for local government. It is this control that provides the link to the crown or the government. It is also an acceptable fact that the government carry out its numerous and varied functions and responsibilities through its departments and agencies including the respondent. In the circumstances, I accept the submissions by the learned counsel for the appellants that to construe that the respondent as local authority and hence an agent of the government of Sarawak do not have the statutory duty to cut down the impugned diseased trees that grew on state land and pose danger to the public would be absurd. If in respect of private land the respondent is empowered to serve notice to the land owner to cut or trim any trees that pose danger to public, this would be more so in respect of state land. If the contention of the respondent is correct that it has no duty to cut down diseased trees on state land within its jurisdiction it would mean that any trees that are grown on state land adjoining any public road which pose danger to the public the respondent is not responsible to ensure safety of road users using public roads within the local authority area. That certainly cannot be true. At this point is pertinent to note the trial judge in her written judgment at p. 81 of the appeal record did make a finding that it was not disputed that the fallen tree in this case was actually rotten at its base.

[21] On the second issue, the law as found in s. 3(1) City of Kuching North Ordinance 1988 delineates the area of City of Kuching North as described in the Schedule to the Ordinance. This area includes lot 51 and lot 43. The respondent is the

designated local authority for the area. This is not in dispute. Section 6A(1) of the same Ordinance provides that the administration of the public affairs of the City of Kuching North, the provision of local authority services within the area and the exercise of all those powers or functions conferred on a local authority under the Local Authorities Ordinance (Cap. 20) or under the Ordinance or any other written law, shall be vested in and exercised by the respondent. Subsection (2) of the same section provides that without prejudice to subsection (1) and notwithstanding the provisions of any other written law regulating the powers, duties and functions of a local authority or a local council, the powers, duties and functions of a local authority or a local council under any written law pertaining to road traffic within the City of Kuching North shall be exercisable and discharged by the respondent.

[22] At this point, reference to s. 119 of the Local Authorities Ordinance 1996 would be pertinent and useful. Under the section a local authority has powers and shall exercise functions in respect of public roads, other than a federal road, within its local authority area. Pursuant to paras. (f), (g) and (m) of that section, these powers and functions include maintaining road shoulders or verges, pavements and public drains; providing landscaping for beautification of public roads and to do such act or take such action as may be necessary to ensure the safety and convenience of the public on any road in a local authority area. In my opinion, these provisions, especially para. (m) of the section which stresses on the safety of the public using public roads, must be interpreted liberally in order to give effect to the provisions. This interpretation is to be preferred if the section is read together with the provisions of s. 120(3) of the Ordinance which has been reproduced above. From the reading of these two provisions it is obvious that a local authority has a duty to maintain all public roads, and also has the power to direct private road owners to maintain their private roads, for the safety of the public who uses the roads.

[23] In the circumstances therefore, the answer to the two issues raised in this appeal is in the positive. Accordingly I find that the respondent is liable for negligence in that it has breached its statutory duty to maintain the road at Jalan Crookshank where the accident occurred to ensure that it is safe for public use.

[24] The next issue is damages. Are the appellants entitled to the general and special damages as claimed in the amended statement of claim? Before I deal with the issue I will say something on the respondent alternative defence that is the accident was an act of God and was inevitable one due to natural calamities or forces of nature or inclement weather at the material time which were entirely beyond the control of the respondent or unforeseeable.

[25] Reading the grounds of judgment of the learned Sessions Court Judge at pp. 76-82 of the appeal record, it is clear that this defence though considered by the learned judge, was not the ground for the court to dismiss the appellants' claim. In dealing with this defence the trial court had considered the evidence of DW1, the officer from Malaysian Meteorological Service Department, Petaling Jaya who testified as to the wind conditions on the day of the accident. The readings of the wind condition as testified by DW1 is found at p. 15 of exh. P1. Having considered the evidence of this witness the trial court found that on the day of the accident the maximum surface wind was 18.0 metres per second which the witness classified as gale under the Beaufort Scale specification and conclude that the strong force of the wind must have caused the tree to fall. On this point the learned judge wrote in her judgment as follows:

> It was not disputed that the fallen tree was actually rotten at its base and given the magnitude of the wind condition, the force must have caused the tree to fall.

[26] It is apparent that the strong force of the wind is not the sole factor that cause the tree to fall. The contributing factor is also the rot at the base of the tree as found by the trial judge. In this respect one may therefore ask that if the respondent had carried out its duty diligently to maintain the safety of the public roads in the area by carrying our regular or periodical checks on all the trees grown along side Jalan Crookshank especially trees that are grown on lot 51, could the accident be avoided? If the regular and periodical checks and maintenance were carried surely the rot at the base of the tree could have been discovered. In this respect I disagree with the finding of the trial judge the accident was inevitable.

[27] Now I will deal with the damage claim. The 1st appellant claims for general and special damages. The items for special damages for the 1st appellant is spelt out in para. 8(i) to (vii) of the amended statement of claim.

[28] The first item of claim for special damages by the 1st appellant is loss of income. The 1st appellant had adduced evidence that after the accident he is unable to work for a period of ten months. Before the accident, 1st appellant testified that he earned an average income of RM3,000 per month. He said he needed RM2,000 for petrol and car maintenance and RM600 as living expenses per month. Therefore the 1st appellant testified that after deducting his expenses of RM600 he suffered a loss of income of RM2,400 per month. Thus for a ten month period he lost a total of RM24,000 of his income. The respondent objected to this claim. Learned counsel for the respondent submits that there is no medical report or evidence to show that as a result of the accident the 1st appellant was unable to return to work as a taxi driver for ten months. In other words there is no evidence of disability. There were also no supporting documents produced as to income and expenses by the 1st appellant. As such learned counsel for the respondent submits that this claim should be disallowed.

[29] The 1st appellant's evidence as to his income or loss of income is found in para. A4 (a) of his witness statement which is exh. P2 at p.138 of the appeal record. There is no reference to any document to support the claim of his income and expenses. There is also no other evidence from other witnesses to corroborate or support the 1st appellant's claim. When 1st appellant was cross-examined on the matter the 1st appellant told the court that he did spend some money for petrol and maintenance of the taxi. That is about all. Claim for loss of income is a claim under the head of special damage. The law requires that this type of claim must be strictly proved. The claim involves two aspects – one is the period the 1st appellant was out of work which was claimed to be ten months and the other is the amount of income and expenses of the 1st appellant. In this regard I have to agree with learned counsel for the respondent that the evidence is lacking. In the circumstances, this head of claim is disallowed.

[30] Next, the 1st appellant claims for nursing care amounting to RM4,000. In his witness statement – at para. A4 (b) of Exhibit P2 – the 1st plaintiff testified that during the ten months period he was unable to work he had to engage a maid to take of him. 1st appellant said he paid the maid RM400 per month. Therefore he said for ten months – from 19 October 2000 to September 2001, he spent RM4,000 to hire a maid to look after him. So he

claims this amount as his nursing care. When he was cross examined on this issue, 1st appellant testified that he had engaged an Indonesian maid by the name of Jenny to take care of him and he paid her RM400 per month for ten months. However he said he did not have any receipts or document to show the payments of her salary. He also testified that the maid was introduced to him by a friend. Again, the respondent objected to this claim on the same ground as it had objected to the claim for loss of income that is there is no evidence to support such claim. I agree. This is also a claim under special damages, so it has to be strictly proved. The 1st appellant testified that he could not produce receipts of payment for the salary of the maid he had hired. 1st appellant could have called the maid, whose name 1st appellant said was Jenny, to testify as to whether she was actually hired by 1st appellant and whether she was actually paid RM400 per month. This was not done. The 1st appellant also had not called his friend who had introduced Jenny to him to testify to support his claim. Therefore in my view the 1st appellant has not discharged the burden of proof required of him on this claim. There is also no medical report or evidence produced to show that the 1st appellant required nursing care for ten months after being discharged from Normah Medical Specialist Centre. Accordingly, I will also disallow this claim.

[31] The next claim for special damage by the 1st appellant is for medical bills from Normah Medical Specialist Centre for the sum of RM20,790.33. This amount is supported by the document at p. 10 of the agreed bundle of documents, which had been agreed to authencity only. In his witness statement exh. P2 para. 4A (c) 1st appellant testified that he was admitted to Normah Medical Specialist Centre on 19 October 2000 and was discharged on 29 October 2000 – for a period of ten days. The 1st appellant was not cross examined on this issue. Therefore I take it that the respondent accepted this amount as evidence by the document in the agreed bundle as fair and correct amount. Accordingly, I will allow this claim.

[32] The next item of claim by 1st appellant under the head of special damage is cost of transportation for relatives to and from home to Normah Medical Specialist Centre in the sum of RM1,000. Learned counsel for the respondent urged the court to reject this claim because the expenses were not incurred by the 1st appellant himself. In his witness statement exh. P2, the 1st appellant testified that during his 10 days hospitalization at

Normah Medical Specialist Centre all his relatives – brothers, sisters and nephews visited him and took care of him. He also testified that his son alone had made at least 20 trips at RM50 per trip. Again the 1st appellant was not cross examined on this point. Therefore I accept the evidence as the probable truth and allow this amount of claim for transportation costs. Its normal to expect that relatives, especially close members of the family, to visit the patient when he or she is hospitalized. The members of the family would be expected to visit more often in order to take care of the needs of the patient over and above what can be provided by the hospital.

[33] As to the other claims relating to payment for police report [RM6], medical bill from Sarawak General Hospital [RM26] and medical report from Dr. Goh Jin Cheong [RM40] I will allow them also as they are not being disputed and well supported by documentary evidence.

[34] The next head of claim for damages by the 1st appellant is for general damage. Learned counsel for the 1st appellant suggested a sum of RM100,000. He submits that the medical report of Dr. Ching Hin San at p. 7 of exh. P1 shows that the 1st appellant suffered 'a large left frontal/temporal/parietal extradural clot with underlying brain contusions' as showed by CT brain. He also cited *Goh Chin Tee (infant) v. Lau Chun Leung* [1985] MLJ 2 cxii where a Singapore Court awarded S$42,000 for fracture of the frontal bone involving the frontal sinus and base of the skull, extradural haematoma left frontal region, haemorrhagic contusion left frontal lobe.

[35] However in *Hamizan bin Abd Hamid v. Wong Kok Keong & Anor* the High Court at Shah Alam awarded only RM18,000 for cerebral concussion and bleeding and fracture of the skull, causing weakness and spasticity of the lower limbs. In that case there is a permanent residual effect of the brain injury in the form of weakness an spasticity of the plaintiff's lower limbs especially the left lower limb. The skull was fractured on the left temporal region. In another case, which was filed in 1977 and decided in 1981, *Thangavelu v. Chia Kok Bin* [1981] 2 MLJ 277, the victim of the accident was admitted into Kajang hospital in a state of coma with haematoma on left temporal region and some other injuries. The patient was then transferred to General Hospital Kuala Lumpur and underwent immediate emergency operation and

passed away 11 months and six days after the accident. The court in that case awarded only RM20,000 for pain and suffering and loss of amenities.

[36] For the respondent it was submitted that injuries sustained by the 1st appellant as set out in para. 7(A) of the amended statement of claim is somewhat exaggerated. Learned counsel for the respondent submits that the diagnosis by Dr. Goh Jin Cheong as found in the medical report at p. 8 of exh. P1 is that the 1st appellant suffered a fracture on left parietal region with extradural hematoma. This injury was confirmed by a specialist medical report of Mr. Ching Hin San of Normah Medical Specialist Centre as found at p. 7 of exh. P1. Mr. Ching's medical report on the 1st appellant states that 'CT brain showed a large left frontal/temporal/parietal extradural clot with underlying brain contusions'. The report also states that the 1st appellant was operated on after admission, resuscitated in intensive care unit till 25 October 2000. The 1st appellant was discharged on 29 October 2000 and on discharge the 1st appellant was obeying commands. To be noted also is that in exh. P2 Mr. Ching Hin San, the consultant neurosurgeon at Normah Medical Specialist Centre, in a letter to the plaintiff counsel had confirmed that the assessment on the 1st appellant showed no evidence of C3 fracture. In another words, learned counsel for respondent submits, the injuries that need to be quantified for the purpose of assessment of damages is that of left parietal fracture with extradural hematoma for which the 1st appellant was operated on. In short, learned counsel says, the nature of injury is head injuries. Citing the authorities mentioned earlier, he suggested a sum of RM15,000 as a reasonable compensation in damages.

[37] Having regard to the injuries sustained by the 1st appellant and the awards given respecting the same or similar kind of injuries as evident by the authorities cited, I tend to agree that the figure suggested by the learned counsel for 1st appellant is on the high side. It must be admitted that there is no fixed scale on which the court could refer to in order to award damages that is reasonable in a particular case. The quantum must be decided on the particular facts of each case by taking into consideration all the relevant factors. Also to be borne in mind is that the purpose of compensation in the form of damages is not to punish the defendant/respondent; but to restore the position of the plaintiffs/appellants to what it was before the accident to the extent practically possible by the award. In this respect I must take note

of the submissions by the learned counsel for respondent that there is no medical evidence or medical report to suggest that the 1st appellant suffered any disability, temporary or permanent, after the discharge from the Normah Medical Specialist Centre. There is also no evidence to show that he is unable to return to work as a taxi driver. It is also pertinent to consider that in cases where the court had found neurological disabilities or otherwise as demonstrated by the cases cited hereinbefore, the award was very much less than what is suggested by the learned counsel for the 1st appellant. In this instant case there was none – no neurological disabilities and no permanent injury that could reduce the capacity of the 1st appellant to function as normal as before the accident. However I am mindful of the inflationary factor. The cases referred to earlier are about more than ten years old. The accident occurred in 2000. Considering all these factors I think a sum of RM30,000 as general damages would be fair and reasonable.

[38] In respect of the 2nd appellant's claim for special damage in the sum of RM25,000, it is not stated for what item. Presumably as suggested by learned counsel for respondent it would be for the loss of the vehicle – the taxi. But the evidence of the 1st appellant under cross examination is that the taxi was sold to him by the 2nd appellant. Therefore it was submitted that this seems to be contrary to what was stated in para. 1 of the amended statement of claim which says that the 1st appellant is the authorized driver of the taxi; which implies that the taxi belong to someone else. However in para. 2 of the amended statement of claim the 1st appellant pleaded that the vehicle was registered in the name of the 2nd appellant. This fact was confirmed and corroborated by the evidence of PW2, in his witness statement exh. P3 para. 1(i). When the 1st appellant was cross examined on this, he testified that the taxi belonged to him but was registered in his brother in law's name ie the 2nd appellant. He further testified that the taxi licence was in his name; but the taxi was sold to him by the 2nd appellant. However at the material time the transfer of ownership was not done yet. I accept this evidence. It was not seriously challenged. Legally therefore the vehicle still belonged to the 2nd appellant at the time of the accident.

[39] As to the claim of RM25,000 as special damage for the loss of the vehicle, the 1st appellant testified that the vehicle was purchased for about RM28,000 it was not stated when was the purchased made. However the 1st appellant testified that at the material time (time of accident?) the taxi was about 14-15 years old. As to how he arrived at the value of the vehicle at RM25,000 at the time of the accident, the 1st appellant's answer is that that is the value he gathered from his friends. But the 1st appellant did not produce any substantive evidence to support this figure. PW2 in his evidence also cannot be of any assistance to the 2nd appellant in this because in his witness statement exh. P3, PW2 simply said the estimated value of the vehicle at the time of the accident was RM25,000 without any supporting evidence. In other words, the basis as to how the appellants arrived at this value is never explained or made known to the respondent.

[40] I think the evidence by the appellants as to the value of the vehicle at the time of the accident is insufficient and not convincing. As correctly submitted by counsel for respondent, if the vehicle was purchased at RM28,000, surely after 14-15 years of use the value may have depreciated considerably. There is also no evidence of actual date of purchase of the vehicle. As the claim is for special damage claim, the 2nd appellant is put to a strict proof of it. In the absence of any substantive evidence as to the value of the vehicle at the time of the accident court is unable to make a judicial assessment of the value of the vehicle that was damage for the purpose of the claim under this head. Nevertheless, the court recognizes that there is a value to be attached to the vehicle at the time of the accident. In the circumstances the court will award a nominal damage of RM100 as special damage for the loss of the vehicle.

[41] In conclusion therefore, it is my finding that the respondent has a statutory duty and obligation under s. 3(1) of the City of Kuching North Ordinance 1988 read together with s. 119 of the Local Authorities Ordinance 1996 to maintain public roads within its territorial limit and jurisdiction and to ensure that those roads are safe for public to use. Therefore the respondent has a duty of care toward the 1st appellant. In this regard the respondent has breached this duty when it fails to maintain the safe use of Jalan Crookshank at the material times when it fails to take the necessary action to remove or cause the diseased tree that had fallen onto the 1st appellant's vehicle.

[42] As to damage claim, for the reasons already explained I will allow, for the 1st appellant's special damage claim under para. 8 (iii) to (vii) both inclusive and disallow the claim in para. 8 (i) and (ii) of the amended statement of claim. The claim allowed under this head will carry an interest of 6% p.a. from the date of the accident ie 19 October 2000 to date of judgment and thereafter at the rate of 8% p.a. from the date of judgment till full and final settlement.

[43] On general damages, I will award the 1st appellant a sum of RM30,000 which shall carry an interest at the rate of 8% p.a. from the date of the issuance of the summons ie 16 August 2002 until full and final settlement.

[44] As for the special damage for the 2nd appellant, I will award a nominal sum of RM100. The award also will carry an interest of 6% p.a. from the date of the accident till date of judgment and thereafter at 8% p.a. till full satisfaction.

[45] So ordered.